

Catharine Marbury Spinster, Benjamin Woodroffe, D. D.
and Mary his Wife, Gilbert Thacker, Esq; and
Eliz. his Wife, Sisters and Coheirs of William and
Richard Marbury decess'd

Appellants.

Executors of Torbuck,
Ann Andrews, and
several others

Respondents.

The Appellants C A S E.

In Jan. 1667. **T**HOMAS Marbury, the Father of William, &c. being Seized in Fee of the Mannors of Marbury, Weaverham, and Reddish, and of the Town-ship of Gropenhal, and Latchford in the County of Chester, by Will devised to Mary his Wife, William his Son and others all; his said Mannors, &c. for 100 Years, In Trust, to raise Money to pay his Debts, and an Annuity of 120 l. per Annum to his Wife for Life, to his Son Richard 40 l. per Annum, to his Daughter Catharine 1000 l. and to Mary and Elizabeth 1000 Marks each for their Portions, and 10 l. per Annum a piece, during their Mothers Life, and 20 l. per Annum a piece after her Death, till their Portions Paid; and gave his Son William 50 l. per Annum, till his Debts Paid, remainder of the Term to William, made his Wife Executrix and Dyed, leaving his said Mannors, &c. so Charged to descend to William his Son and Heir.

In the Year 75, 76, and 77, and after. William made several Mortgages of his Estate in several Parcels, to several Persons, and also Incumbered it, with divers Statutes, Judgments and Recognizances, and contracted many other Debts by Bond, and simple Contract, &c. and Dyed, leaving the same so incumbered to descend to Colomel his Son, an Infant, who dyed few hours after him, the Estate then descending to Richard his Brother, who also dyed 4 months after, and the Estate descended to Catharine, Mary and Eliz. Sisters and Coheirs.

1st and 2d of August 1687. The Coheirs, their Trustees, and other Creditors, by Mortgages, Statutes, Judgments and Recognizances, &c. for 11200 l. lent by the present Mortgagees, mortgaged to them the Cheshire Estate, to be repaid in a year, at 5 l. 10 s. interest.

Soon after this Torbuck, and 12 other Creditors with him, and Noy and Andrews, exhibited their Bills in Chancery for their respective Debts, founding their Bill on certain pretended Deeds of the 26 and 27 of February, 1672, and the pretended Will of William Marbury, praying that the Estates might be sold, and their Debts paid, and the Mortgagees brought their Bill to foreclose, or the Estate to be Sold and their Debt paid.

The Coheirs also brought their Cross-Bill, to discover the Debts and Securities, and prayed they might not be charged beyond the value of the Estate, descending to them, and submitted to be charged so much, and to pay what it was worth above the Debts by them paid, and which were due to themselves, as claiming under their Father's Will, and that a Commission might issue to prove the value.

These Causes came to be finally heard 13th August, 1701, and then it was decreed, that first the Debts of Thomas the Father, then of William, and then of the Coheirs should be paid, and all Partys were to go to account, and all just allowances were to be made the Coheirs, and what they had actually paid, to be allowed, and no more, and lasting improvements.

Six Months after the Decree, the Appellant Dr. Woodroffe having married Mary, one of the Coheirs, proposed to give 23000 l. for the purchase, and by order of Court paid 1000 l. in part, and was compelled to consent the same should be forfeited, if he paid not the residue in about 4 Months, the Court refusing him to be purchaser, without such consent; but by means of the Creditors and their Solicitors delays, and other hardships put on the Dr. he could not make the subsequent payments within the times appointed by the Court, whereupon the Court not only exacted from him the Forfeiture of the 1000 l. But Condemned him in Costs, which he paid the Creditors, and discharged him from being the Purchaser, not allowing further time to prove the Appellants Demands, which were to be retained out of the Purchase-Money, though the Evidences for the same were unfortunately Burnt in the late Fire in the Temple, and the Dr. was under an Impossibility to make the necessary Proofs without time to execute a new Commission.

The Estate being again at Sale, about six Months after the Earl Rivers proposed to give 18500 l. for it, and was certified the best Purchaser; but at the instance of the Creditors time was given to bring in a better Purchaser by the last Day of Easter Term last.

Two or three Days before which, Dr. Woodroffe proposed 19000 l. and was again certified the best Bidder.

25 May 1705. Then Earl Rivers moved to be absolutely confirmed the Purchaser at 18500 l. or presently discharged, and paid his Costs; but 500 l. more being bid by the Dr. and insisted on by his Counsel, the Court ordered it for the Dr. if he paid 2000 l. in part in a Week, and the 17000 l. residue in three Months, with a penalty to lose his 2000 l. if he failed in the later Payment, and the Dr. paid his 2000 l. in the time.

No Room being then left for Earl Rivers to apply to the Court himself, the Mortgagees and Creditors moved to discharge the Drs. Order, and for Earl Rivers to be the Purchaser at 18500 l. but the Lord Keeper said, that he was tied up by the Decree to sell to the best Bidder, that the Dr. had bid most, and was therefore the best Bidder, and had performed the last Order, and ought to be Confirm'd.

But Earl Rivers's Counsel grafting on the Creditors Motion proposed that if the Earl (then present) would give 500 l. more to make him equal with the Dr. then he would be the best Bidder; which being proposed, and the Lord Keeper asking the Earls Consent, and he accepting the offer, it was then decreed for the Earl and the Doctor's 2000 l. to be taken again out of the Court, it was urged for the Dr. that he was in Possession of an Order to be the Purchaser on his performance of the Condition, that he had performed the Condition, and that it was not consistent with Equity thus to deprive him; but in vain.

The Dr. then declared he could not depart from his Bargain, that it was irregular for any thus to bid upon him, but if there must be a new bidding, he would bid a 100 l. more, but that being slighted, he then bid 500 l. more; notwithstanding which, the Purchase was decreed for the said Earl.

After this the Dr. gave notice of a motion to discharge Earl Rivers's Order, and that the Dr. might be the Purchaser, or his former 1000 l. repaid him, but could not obtain it.

In the mean time disputes arising between the Mortgagees and Creditors, who should have the Preference in receiving their respective debts, the Mortgagees petition'd for a Re-hearing of the Cause, which was granted, and ordered accordingly, and the Creditors moved to discharge the Order for Re-hearing, and at coming on of these motions the 10th of July last, the Doctor's Counsel offering to move pursuant to his notice were denied to be heard, and told, that upon no Consideration should Earl Rivers's Order be altered.

From which Decree and Proceedings thereon, the Appellants conceive and are advised they have good ground for an appeal for the several Reasons following.

- First. For that the Foundation of all the suits from the Bond and simple Contract-Creditors and of the decree thereon, seems to be built upon the validity of the deeds of the 26th, and 27th of February, 1672. and of the Will of William Marbury; which Deeds, and Will have all the marks of Fraud and Forgery sufficient to evince that they were never made and executed by William Marbury.
- Secondly. For that the Estates in Question are by this decree loaded with a Debt claimed by Mrs Andrews, and another Debt by the Executors of Mr. Noy Deceas'd, which have no good consideration to support them, and also with the Debt of Couch, claimed upon a Note pretended to be given by William Marbury, but is much suspected to be forged.
- Thirdly. For that the Appellants accounting what is due to themselves, have Paid to the several Creditors of Thomas and William Marbury much more than the several Mannors and Lands thereby decreed to be Sold, are worth, are or can be Sold for, and it cannot be consistent with equity to decree an Estate to be Sold and Wrested out of the Hands of the Appellants, when they have actually Paid more in discharge of the Incumbrances affecting the same, than can be charged as Assets by descent, or otherwise, in the Appellants Hands.
- Fourthly. For that it appears by the proofs, that the Estates in Question are worth above 30000 l. and are now Sold at 19000 l. so that if any Sale were just, yet not at such a Price, which must be to the utter Ruin of the Appellants, the Marbury's ancient Family.
- Fifthly. For that there is no necessity for a Sale to Pay the Mortgagees, their Security being sufficiently ample, and they in the receipt of the Profits, and the Appellants are ready to account with them and Pay them their Money.
- Sixthly. For that by the Rehearing of the Causes, there is a suspension of Part, if not of the whole Decree, and though it was Reheard, yet no order was made thereon, and therefore this decree ought not to be in force in any Part of it, to Wrest the Appellants Estate from them.
- Seventhly. For that the Decree for Sale of the Estate for Payment of Debts makes no provision for, nor directs the disposal of the surplus.
- Eighthly.

The Appellant Dr. Woodroffe, is agriev'd with the proceedings upon the said decree, for that upon his former bidding of 23000 l. and Paying in 1000 l. of it in Court, which was applied by the Court for Payment of Debts, in case of the Estate, yet he hath been discharged from being the Purchaser at the said Sum of 23000 l. and been punished with the loss of the said 1000 l. by virtue of subsequent Orders, which it was impossible for him to comply with; which said 1000 l. is to be sunk as to him, he being neither to be Repaid the Money, nor suffered to stand in the Place of the Mortgagees, who Received the same, to be Repaid out of the Purchase-Money, notwithstanding he was also condemned in Costs, and Paid them, though it could not be understood, that the 1000 l. should be Paid by him for any other reason, than to answer Costs, if he failed in the Purchase.

Ninthly. For that after this punishment, when he had put himself in a Condition by his second Proposal to recompense his former Loss, and retrieve the Estate, and was admitted Purchaser on Condition, performed the Condition, and thereby was in Equity the absolute Purchaser, and in respect of his Relation to the Estate, was more intitled to the favour of the Court, than a Stranger on the same terms, yet was discharged, to let in a Stranger that came to bid upon him, contrary to the Rules of the Court.

Tenthly. For that he could obtain no Relief in Chancery, though often attempted, the Court refusing upon any Consideration to alter the Earl Rivers Order; which Order if it had been regularly obtained, yet was it Repugnant to the Decree it self, there being 500 l. more bid by the Dr. For which and many other Reasons, the Appellants conceive themselves to be greatly Injured; and humbly Hope the just and seasonable Relief of this Honourable House, In the reversing of the said Decree, and the subsequent Orders thereon.

Richard Coxeter.